

No. 1357

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Supreme Court of the United States

FRANK F. WHITFIELD, individually and as guardian of
and for HAROLD R. WHITFIELD, an incompetent,
Petitioners-Appellants,
below,

vs.

THEODORE D. PARSONS, and HARRY B. HEAVILAND,
Executor of the last will and testament and codicil of
Howard Whitfield, deceased, and the "Howard Whitfield
Foundation" a corporation of New Jersey,
Respondent-Appellee,
below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

KALISCH & KALISCH,
Solicitors for and of Counsel with
Defendants-Appellants.
1180 Raymond Boulevard,
Newark 2, New Jersey.

HARRY KALISCH,
Of Counsel.



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Supreme Court of the United States

FRANK F. WHITFIELD, individually
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HEAVILAND, Executor of the last will
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ard Whitfield, deceased, and the
"Howard Whitfield Foundation" a
corporation of New Jersey,
Respondent-Appellee,
below.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States.*

Petitioners, Frank F. Whitfield, individually and as Guardian of and for Harold R. Whitfield, an incompetent, respectfully present this petition for a writ of certiorari to review the final judgment of the Court of Errors and Appeals of New Jersey, filed in the Clerk's Office of the Court of Errors and Appeals, April 14, 1947 (See p. 138 record), which affirmed a decree of the Court of Chancery of New Jersey in favor of respondents and against your petitioners.

Summary and Short Statement of Matter Involved.

On March 6, 1944, your petitioners, Frank F. Whitfield, individually and as guardian of his brother, Harold R. Whitfield, (an incompetent) brought suit in ejectment in the Supreme Court of New Jersey (Monmouth County Circuit) against respondents, Theodore D. Parsons and Harry H. Heaviland, Executors, etc., of the last will and testament and codicil of Howard Whitfield, deceased, and others, to recover possession of certain real estate known and designated as 71-73 Broad Street, Red Bank, Monmouth County, New Jersey. Your petitioners claimed to own said property as sole heirs of their father Howard Whitfield and as his devisees under his last will and testament and codicil, as is disclosed by the complaint and bill of particulars filed by your petitioners in the aforementioned ejectment suit (See p. 46, Record).

On July 12, 1944, respondents herein filed their bill of complaint in the Court of Chancery of New Jersey, praying for an injunction to restrain your petitioners herein from proceeding further with the said action at law in ejectment, alleging as their sole ground for injunctive relief, an earlier Chancery proceeding (Will construction case) between the same parties in which the title to the real estate in question was determined adversely to them and that the decree in that case dated September 10, 1942, was *res judicata* as between the parties and that your petitioners were estopped from again trying the same issue, (title to the real estate), in the ejectment action and from attacking collaterally the decree in the earlier suit (Will construction case) (See p. 6, Record).

To the said bill for injunction your petitioners herein, filed their answer, and amended answer by leave of the Court, denying that the issues in the earlier will construction case were the same as in the ejectment action, and specifically denying that in the earlier Chancery suit (will construction case) resulting in the decree of September 10, 1942, the legal title to the property involved in the aforesaid ejectment action was an issue, and further denying that the Court of Chancery in the will construction case had power or jurisdiction to examine or decide the legal title to the real estate in question, and further denying that the decree in the will construction case attempting so to do was *res judicata* as between the parties and that your petitioners were estopped from having examined and determined by an ejectment action the legal title to the property in question. Your petitioners herein, by their answer further alleged that the decree in the previous will construction case, in so far as it attempted to determine the title to the real estate in question was *coram non judice*—a nullity—and that any injunctive order or decree which prevents the defendants (petitioners herein) from pursuing their action of ejectment would be in violation of Article 14, Section 1, of the Federal Constitution (See p. 55, Record).

The ~~decree~~ ^{Cause} came on for hearing before the Vice-Chancellor on October 4, 1945, at which time defendants (your petitioners herein) moved to dismiss complainants' bill for the reasons set forth in their answer above referred to. Briefs were submitted wherein the question was fully argued (See p. 94, Record).

The Vice-Chancellor denied the motion to dismiss the bill and decreed that your petitioner be enjoined from fur-

ther prosecuting their action in ejectment upon the sole ground that the previous decree in the will construction case was *res judicata* as to said ejectment action (See p. 64, Record).

The Vice-Chancellor's opinion upon which the decree rests states that since the Court of Chancery has general jurisdiction in cases of trusts, etc., that as *incidental* to such jurisdiction over trusts it had power to pass upon questions of legal title to lands; and that a trust was involved in the will construction case in connection with the land in question, and that Chancery, therefore, had jurisdiction, and having determined the legal title in that earlier suit (will construction case), it was *res judicata* (See pp. 61-62, Record). The finding by the Vice-Chancellor that there existed a trust in connection with the real estate involved, was a surprising misstatement of the issue raised by the pleadings in the earlier case (Will construction case), since a careful reading of those pleadings discloses that no trust was claimed as to the real estate in question, but *only* as to the personal property, in fact the pleadings expressly *excepted* the real estate from the trust.

It is true as pointed out in the Vice-Chancellor's opinion that the *will* which was attached to the bill of complaint in the will construction case, mentions a trust devise in connection with the real estate involved, but whether or not that trust devise was valid or legally effective, to determine which it would be necessary to decide whether the trustee had legal title—was never drawn in question by the pleadings. Nor could it be, since Chancery had no power to decide the question of legal title to real estate, except as incidental to a trust or some equitable relief prayed for.

The question of legal title to the real estate was reserved by your petitioners for another tribunal which had competent jurisdiction to determine the matter—action in ejectment; and to forbid your petitioners by injunctive decree from pursuing their said action in ejectment was a violation of the 14th Amendment of the Federal Constitution.

From the decree of the Chancellor as above advised by the Vice-Chancellor your petitioners appealed to the New Jersey Court of Errors and Appeals which is the Court of last resort in all causes; the same jurisdictional and constitutional question was presented to that Court, and in view of the unanticipated finding by the Vice-Chancellor below that one of the issues in the will construction case was a trust as to the real estate, and that Chancery had jurisdiction to determine legal title to land as *incidental* to the trust, your petitioners in addition to the jurisdictional question, urged the principle authoritatively settled by many cases in New Jersey and elsewhere, that what is incidentally decided is not *res judicata*, and that the Court of Chancery was without power to grant the injunction and to do so was in violation of the 14th Amendment of the Federal Constitution.

The Court of Errors and Appeals affirmed the Chancery decree on the opinion filed in the Court below by the Vice-Chancellor, and the judgment of affirmance was entered April 14th, 1947 (See p. 138 record).

Thus your petitioners, the said Frank F. Whitfield individually and as guardian of Harold R. Whitfield, his incompetent brother, are deprived of their inheritance without having had their day in Court under the Constitution

and laws of the State of New Jersey, and in violation of the 14th Amendment of the Federal Constitution, Section 1, which provides:

“Nor shall any state deprive any person of life, liberty or *property* without due process of law, etc.”

Statement Particularly Disclosing the Basis On Which It is Contended That the United States Supreme Court Has Jurisdiction.

The jurisdiction of the United States Supreme Court rests upon the statutory provision contained in United States Code Annotated, Title 28, Section 344, paragraph (b), which provides:

“It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution.”

Your petitioners rely on the 14th Amendment to the Constitution of the United States, Section I, which provides:

“Nor shall any state deprive any person of life, liberty or *property* without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Your petitioners raised the constitutional question, by their pleadings and on motion to dismiss complainants' (respondents here) bill for injunction in the lower court and on appeal in the New Jersey Court of Errors and Appeals.

The necessary effect in law of the adverse decision and judgment in both courts enjoining the further prosecution of petitioners' ejectment action, was a denial of your petitioners' constitutional rights under the due process clause of the 14th Amendment of the Federal Constitution, above set forth.

The Question Presented.

The questions presented are:

1. Was the legal title to the real estate in question an issue in the earlier will construction suit in Chancery under the pleadings thereof, so as to constitute *res judicata* as to the subsequent ejectment action?

We maintain that it was *not* an issue and that the decree deciding that issue was a nullity and could not afford a ground for the application of the *res judicata* rule as a bar to the subsequent ejectment action.

2. If the legal title to the real estate in question was an issue in the earlier will construction suit in Chancery, and from an examination of the pleadings we cannot perceive how it could be, then did the Court of Chancery under the Constitution and laws of New Jersey have jurisdictional power to determine it.

We maintain that it did not have that power and its decree deciding that issue was a nullity, and could not bar the action in ejectment on the ground of *res judicata*; and that the decree and the subsequent affirmance thereof, enjoining the further prosecution of said ejectment action because of the *res judicata* rule was a denial of your petitioners' right under the 14th Amendment of the Federal Constitution, as above pointed out.

3. If, as was erroneously held by the Vice-Chancellor in granting the injunction, a trust was involved in the will construction case affecting the real estate in question and that, therefore Chancery in the will construction case, had jurisdiction to determine the title to the real estate as incidental to that trust, which he would have no jurisdiction or power to decide without the presence of the trust or other equitable relief prayed for, then would such incidental determination of that title be *res judicata*, under the Constitution and laws of New Jersey, so as to prevent your petitioners from having the title *directly* examined and determined in their action of ejectment? And if under the laws of New Jersey matters incidentally decided are never *res judicata* then was not the injunctive decree forbidding the further prosecution of the ejectment action, a denial of your petitioners' rights under the *due process clause* of the 14th Amendment of the Federal Constitution.

Reasons Relied On For Allowance.

The Court of Chancery of New Jersey, and the New Jersey Court of Errors and Appeals, which is the Court of last resort in all causes, allowed an injunction whereby

your petitioners were prohibited from submitting to a Court and jury, having jurisdiction of the matter, their claim to certain property which came to them from their father either by inheritance or by his will.

The Chancery Court in allowing the decree of injunction was without any jurisdictional fact or facts permitting it to act in the matter, and the decree was in utter defiance of the laws of the State of New Jersey, its settled legal rules and principles long since established and still prevailing. The Vice Chancellor's sole ground for allowing the injunctive decree viz: *res judicata*—was non-existent; hence the injunctive decree deprives your petitioners of property without due process of law "in violation of the 14th Amendment of the Federal Constitution."

The foregoing grounds were vigorously urged by your petitioners in the lower court and in the highest Appellate Court in the State, but without avail.

Your petitioners now seek a writ of certiorari from this Honorable Court to have reviewed and reversed the aforementioned injunctive decree and its affirmance by the New Jersey Court of Errors and Appeals, under United States Code Annotated, Title 28, Section 344, Paragraph (b).

Wherefore, your petitioners pray that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the cause, and that the said judgment of the New Jersey

Court of Errors and Appeals may be reviewed, determined and reversed by this Honorable Court and such other further relief as this Court may deem proper.

KALISCH & KALISCH,
Attorneys of Petitioners.

HARRY KALISCH,
Of Counsel.

Supreme Court of the United States

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FRANK F. WHITFIELD, individually
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ard Whitfield, deceased, and the
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Respondents-Appellees,
below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We are offering for the consideration of this Court the same brief submitted on appeal to the New Jersey Court of Errors and Appeals with a few additional observations and authorities pertinent to our present application for a writ of certiorari in this Court and in support thereof.

BRIEF IN COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Howard Whitfield, late of the Borough of Red Bank, New Jersey, died on September 20, 1938, leaving a last will and testament and codicil, which were admitted to probate

in the Prerogative Court of New Jersey, on April 6, 1939. Letters testamentary were issued to Theodore D. Parsons and Harry B. Heaviland, executors (the complainants-appellees herein) who took upon themselves the duties of administering testator's estate (See complainant's bill C., p. 1).

Testator was twice married. By his first wife he had two children Frank F. Whitfield and Harold R. Whitfield; they are testator's only surviving heirs. The latter is an incompetent and was such in the lifetime of testator who refers to him in his will as an incompetent. (See Fifth Par. of Will, C. p. 15). Frank F. Whitfield was appointed his substituted guardian by an order of the Monmouth County Orphans' Court on October 27, 1938. (See par. 4. Complainant's bill C. p. 2).

Testator's first wife, the mother of defendants-appellants, obtained a divorce from him, and he subsequently married his second wife, Florence Whitfield to whom he willed for life his residuary estate and whom he appointed executrix of his will. She, however, predeceased testator, and Theodore D. Parsons and Harry B. Heaviland (complainants-appellees) were appointed executors in conformity with the last paragraph of testator's will (C. bt. p. 21).

Testator's first wife also remarried after divorcing her husband, the testator, and is referred to in these proceedings as Eleanor Simpson; that being her second marriage name (C. p. 29 tp.). She was a conditional legatee under testator's will. Both wives are now deceased; the first died pending this litigation (C. p. 29, top), and the second died childless about six months before testator made the codicil to his Will (C. p. 119, bot.). Another legatee

under the Will is testator's sister, Grace Whitehouse (C. p. 15) and she also died pending this litigation and her annuity therefore ceased (C. p. 89, bot.).

The sole remaining annuitant under the Will is Harold R. Whitfield, testator's demented son by his first wife who appears in these proceedings by his brother, Frank F. Whitfield, his guardian. His annuity under the Will is also conditional.

This controversy lies between Frank F. Whitfield, and Harold R. Whitfield, the demented son, who appears by his guardian as aforesaid, both of whom are the children of testator by his first wife, and Theodore D. Parsons and Harry B. Heaviland, the executors named in testator's Will and Howard Whitfield Foundation, a corporation formed by said executors under the provisions of testator's Will.

The assets of the estate consists of real estate and personal property valued at over One hundred thousand dollars (C. p. 87, l. 17 and p. 91, l. 32). The only property involved in the present litigation is the real estate located at 71-73 Broad Street, Red Bank, New Jersey, which the testator died seized of. None of the estate property has been disposed of or mortgaged by the estate, (C. p. 86 and top p. 90).

The Litigation Between the Parties.

From the foregoing state of facts, three suits have arisen.

FIRST: The suit instituted in the Court of Chancery by Frank F. Whitfield, individually and as guardian of his

brother, Harold R. Whitfield, to have their father's Will construed, and which resulted in a decree adverse to them. Date of that decree is December 10, 1942 (C. p. 28) subsequently affirmed by this Court of Appeal (C. p. 42).

SECOND: The action in ejectment in the Supreme Court, Monmouth County brought after the aforesaid adverse Chancery decree and subsequent affirmance by this Court, by Frank F. Whitfield, individually and as guardian of his brother, Harold, against Theodore D. Parsons, Harry B. Heaviland and Howard Whitfield Foundation, a corporation, in which said ejectment action the said Frank F. Whitfield, individually and as guardian, etc. sought to have determined the title to and the right to possession of the property at 71-73 Broad Street, Red Bank, New Jersey, which said property testator died seized of and which the said Theodore D. Parsons and Harry B. Heaviland still hold as part of testator's estate.

THIRD: The Chancery suit now on appeal in this Court wherein Parsons and Heaviland, Executors, etc. of the Whitfield Estate, and Howard Whitfield Foundation, a corporation, prayed for and obtained an injunction restraining the said Frank F. Whitfield, individually and as guardian of Harold R. Whitfield, his agents, etc. from further proceedings with the aforesaid ejectment action upon the ground that the issues in said ejectment action are the same as those determined in the suit to construe the Will and is therefore *res judicata* (See par. 14 Compl't's Bill, p. 6 and V.-C. Berry's conclusions, p. 61, S. of C.).

ARGUMENT.

The only question presented on this appeal is whether the Court of Chancery erred in holding and decreeing that the decision in the suit for construction of the Will, was *res judicata* as to the subsequent ejectment action.

Complainants-appellees maintain that the issues and subject matter in both suits were identical and that by virtue of the *res judicata* rule, the decision in the earlier suit (will construction case) concluded the defendants and estopped them from proceedings with the later action in ejectment (C. p. 5 and 6, par. 12-13-14 of complainant's bill).

In support of their position, complainants-appellees cited below four New Jersey cases: *Putnam v. Clark*, 34 N. J. Eq. 532; *Logan v. Flatten*, 73 N. J. Eq. 222; *Sarson v. Maccia*, 90 N. J. Eq. 433; and *Lane v. Rushmore*, 123 N. J. Eq. 531, Aff. 125 N. J. Eq. 310.

Those cases are referred to in the learned Vice-Chancellor's conclusions as being the authorities relied on by the complainants (C., p. 61, l. 12), and apparently were adopted by the Vice-Chancellor in support of his conclusions, and as the basis for the injunctive decree.

The rule enunciated in those cases has been the accepted law of this state from the earliest times. The only inquiry is whether it applies in the instant case. Did the Court of Chancery have the power or jurisdiction in the earlier suit (will construction case) to determine the matters which the decree in that case undertook to decide?

If it did not then it is not *res judicata* as to the subsequent ejectment action, and the injunction granted in the present suit by the Vice-Chancellor, restraining the further prosecution of the ejectment action should be dissolved, and the bill dismissed.

The four cases *supra* cited by the complainant and relied upon below, definitely state *when* the *res judicata* rule is applicable.

In the *Lane v. Rushmore* case, *supra*, on p. 542, appears the following:

“Again the same Vice-Chancellor in the same case, quoting from *Beloit v. Morgan*, 7 Wall. 619 said that the judgment of a court *having jurisdiction of the parties and the subject matter of the suit* is conclusive.” etc.

And again, on p. 545, same case Vice-Chancellor Stein says:

“At some point in the controversy he must accept the award of the court as final and conclusive, and that point is reached when a *court of competent jurisdiction* has heard and considered all that has been or could have been said, etc. and handed down its decision.”

In *Putnam v. Clark*, *supra*, Chief Justice Beasley refers approvingly to an English case as stating the rule as follows:

“After a recovery *by process of law*; says Lord Kenyon (*Marriott v. Hampton*, 7 T. R. 269) there must be an end of litigation; if it were otherwise, there would be no security for any person.”

The above statement "after a recovery by process of law" means a recovery in a court having jurisdiction over the subject matter and the person. Justice Gray in *Scott v. McNeal*, 154 U. S. Rep. p. 901, in dealing with that subject says:

"No judgment of a court is *due process of law* if rendered without jurisdiction or without notice to the party."

And continuing, on page 902:

"To give such proceedings any validity there must be a tribunal *competent by its constitution—that is by the law of its creation* to pass upon the *subject matter* of the suit," etc.

So that in the *Putnam v. Clark* case, *supra*, the language of Lord Kenyon which Chief Justice Beasley referred to *viz*: "after a recovery by *process of law*" meant, after a recovery in a court of *competent jurisdiction*.

In the *Logan v. Flatten* case, *supra*, the complainant filed her bill for injunction to restrain an action at law and the matter came before Vice-Chancellor Bergen on an application for a preliminary injunction and the Vice-Chancellor disposed of it as follows:

"The difficulty which confronts the complainant is that in the original cause the court was without *jurisdiction to pass upon the subject matter of the present action at law*, etc."

The application for preliminary injunction was refused.

The *Sarson v. Maccia* case, *supra*, recognizes and applies the rule of *res judicata*, but does not deal with the

preliminary requirement of that rule, *viz*: jurisdiction—except by implication in the latter part of the opinion. However, Vice-Chancellor Backes, who wrote that opinion, does make reference to the case of *City of Paterson v. Baker*, 51 N. J. Eq. 49, in support of his views upon the *res judicata* rule and in that case we find on p. 52, the following statement of the law:

“For, in my judgment, nothing is better settled, as a principle of jurisprudence, than that the judgment of a *court of competent jurisdiction*, on a point of law or a question of fact, or on a question of blended law and fact, does, so long as it remains unreversed, have the effect, as between the parties and those standing in privity with them, to put the question or matter adjudged at rest finally and forever and for all purposes. The principle and the reason on which it rests were stated by Chief Justice Shaw, in *Sawyer v. Woodbury*, 7 Gray 499, 502, as follows: ‘It is a principle lying at the foundation of all well-conducted jurisprudence, that when a right or a fact has been judicially tried and determined by a court of *competent jurisdiction*, the judgment thereon, so long as it remains unreversed shall be conclusive upon the parties, and those in privity with them in law or estate’.”

And on page 56, the following:

“Morgan answered that the question as to the validity of the bonds was *res judicata*, and the court so held. Mr. Justice Swayne, in delivering the opinion of the court, said in substances, that the judgment of a court having *jurisdiction of the parties and the subject matter of the suit*, is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same

subject matter, though the *res* itself may be different."

In addition to the above cases relied upon by complainants-appellees see *School Trustees v. Stocker*, 42 N. J. L. 116, in which our Supreme Court states the rule as follows:

"A judgment pronounced by a tribunal *having no authority to determine the matter in issue, is necessarily and incurably void*, and may be shown to be so in *any collateral or other proceeding in which it is drawn in question*. * * * *When the tribunal has not jurisdiction over the subject matter, no averment can supply the defect, no amount of proof can alter the case*. * * * *Neither the acquiescence of the parties nor their solicitations can authorize any court to determine any matter over which the law has not authorized it to act*." Freem. on Judg., 120, and cases cited; 1 Stew. Dig., p. 243 pl. 33. The objection that the question of jurisdiction cannot be raised on the hearing of this writ is not sustained."

An authoritative statement of the law upon the subject at hand will be found in the opinion of Chief Justice Beasley in *Mundy v. Vail*, 34 N. J. L. 420, beginning at bt. of p. 421 and continuing on p. 422 he says:

"The counsel for the defense did not attempt to maintain the propriety of such a decree, but argued that if erroneous it could not be called in question in this *collateral suit*. Cases were cited to sustain this position. But these decisions are all to the effect that the judgment or decree of a court *having jurisdiction* over the controversy and the parties cannot be impeached for error, except in a direct proceeding for that purpose. The proposition has long since taken its place among the settled maxims of law. The

only question is, whether it applies to the present case. If the Court of Chancery, in the case under review, *had the power to make the decree in question, the legal rule thus involved must prevail; but if the court had no such power, the rule is not applicable.* The inquiry is, had the court jurisdiction to the extent claimed?

Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First. The court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. *A defect in a judgment arising from the fact that the matter decided was not embraced within the issue* has not, it would seem, received much judicial consideration. *And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment.* It is impossible to concede that because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, *and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."*

From the foregoing excerpt it appears that three essentials must be present to give validity and finality to a judgment or decree:

First: The court must have cognizance of class of cases to which the one to be adjudged belongs.

Second: The proper parties must be present.

Third: The point decided must be in substance and effect within the issue.

As to the first it is our contention that the question of legal title to real estate is subject matter fundamentally beyond the field of equitable cognizance and that the Vice-Chancellor in the will construction case exceeded his power and jurisdiction in determining the title to the real estate involved in this litigation.

There are numerous cases in New Jersey defining the limits of equity jurisdiction. One of the early authorities on the subject is *Jersey City v. Lembeck*, 31 N. J. Eq. 255; the bill in that case was filed to review the assessments made for public improvement against certain property in Jersey City, and it alleged that the report of the commissioners who made the assessment was fatally defective in that it failed to state that "the amounts assessed on the property owners for benefits were not beyond the amount of the benefits received;" that there was an outstanding lien against the properties as a result of the assessment and that under Legislative authority (Act to quiet title) permission was given to file the bill. The facts in the case were squarely within the language of the act. This attempt to transfer to the Court of Chancery by legislation, the supervisory power of the common law courts over inferior tribunals and persons and bodies exercising particular functions was vigorously opposed by Chief Justice Beasley, who, in his opinion reversing the Chancellor, clearly de-

finer the jurisdictional limitations of our equity court. Beginning on page 264, (*Lembeck case, supra*) Chief Justice Beasley says as follows:

“Giving to these statutory expressions their full, inherent signification, it is perhaps not too much to say that almost every conceivable interest in, and right to, land, and every lien and encumbrance upon it, held or claimed by a person out of possession, could be at the option of the party in possession, placed under the cognizance of a court of equity. It will be sufficient to hint at the innumerable cases to which this power would extend, by specially referring to a few examples. *Whenever the possessor of lands should be apprehensive that an ejectment was about to be brought against him, he could forestall such proceeding by exhibiting a bill in chancery, and, in the absence of all particular equity, have the legal title of his adversary examined by that court, and, if need be, annulled.* So a tenant, in case his landlord should claim any reserved interest in the leased premises, might take a similar course. And there seems nothing to forbid the idea that, under the prevalence of such a power, every case provided for by summary proceedings before a justice of the peace, under the landlord and tenant act, would be within the grasp of the equitable cognizance. Every judgment, every proceeding to lay out a public road, every mechanics lien, every exercise of the right of eminent domain, all these, and the vast mass of analogous procedures, could be brought under the control of the chancellor, and, if a fatal mistake or error should be manifested in any of them, such defective procedures could be avoided by his order. In a word, it seems undeniable that, by force of a statutory interpretation that will support this bill, very much of the authority of the common law

courts, which is exercisable by means of writs of error, certioraris and actions of *ejectment*, would be participated in, to a large extent, by the Court of Chancery. I cannot think that it was the design of the legislature to confound, in this extra-ordinary degree, the well-defined boundaries of these several jurisdictions."

The Chancellor's decree was reversed and the bill dismissed. This case has been persistently followed to the present day and is frequently cited in our reports. See *White v. Cadmus*, 84 N. J. Eq. p. 88; *Bernardsville v. Seney*, 85 N. J. Eq. 271 on p. 285-287; *Dodge v. Jordan*, 91 N. J. Eq. p. 42 on p. 44; *Mackie v. Cain*, 92 Eq on p. 633; *Sutton v. Maurice River*, 93 Eq. 484; *William v. Audubon*, 96 Eq. 460; *Harry v. Tunick*, 97 Eq. 281; *Olding v. Schwenler*, 101 Eq. p. 455; *Suburban v. W. Orange*, 104 Eq. 227; *Mitchell v. Pychlon*, 105 Eq. p. 524; *In re: Branch*, 70 N. J. L. p. 555; *Booth v. Bayonne*, 98 Atl. Rep. p. 666; *Hedden v. Hand*, 107 Atl. Rep. p. 285; *City of Easton v. Miller*, 108 Atl. Rep. 262.

Here then we find Chief Justice Beasley condemning and holding abortive the legislative attempt to confer upon the Court of Chancery, jurisdiction over subject matter which belongs exclusively to our Common Law Courts. As to maintaining the integrity of our constitutional courts; see *Flanigan v. Guggenheim*, 63 N. J. L. 647.

The expression in the foregoing excerpt from Chief Justice Beasley's opinion, *viz*: "in the absence of all particular equity," has not escaped our notice and will be dealt with presently.

An examination of the many cases upon the subject exhibits a settled purpose on the part of our equity court not to determine legal title to real estate *unless in connection with and incidental to some equitable relief prayed for.*

In *Sheppard v. Nixon*, 43 N. J. Eq. on page 633, Justice Depue speaking for the Court of Errors and Appeals says:

“Hence it is settled law that, where the estate is legal in its nature, and the remedy at law is adequate, and full and complete justice can be done thereby, the party will be left to his regular remedy. The exception to this rule is where the case presents some special ground for equitable interposition, such as fraud, accident or mistake, requiring the setting aside or reformation of deeds or instruments of conveyance. If these elements be wanting, a bill to establish the complainant’s title is an *ejectment* bill pure and simple; and if the situation of the parties be such that the complainant may have an action at law to establish his title, his remedy is in a court of law.”

And on page 636 (same case) appears the following:

“Nor is there anything in the character of the litigation that would transfer it to the equity court. The bill presents no grounds for the cancellation or reformation of the McCarney deed. The question at issue is simply the *legal construction* of that deed, and the proper location of its boundaries, questions peculiarly cognizable in a court of law. In *Scrutton v. Brown*, 4 B. & C. 485; *Camden and Atlantic Land Co. v. Lippincott*, 16 Vroom 405; *Cook v. McClure*, 58 N. Y. 437; *Trustees of East Hampton v. Kirk*, 68 Id. 459; S. C. 84 Id. 215, the same questions were decided in actions of *trespass and ejectment*.

The decree should be reversed, and the complainant's bill be dismissed."

The case of Hoagland v. Cooper, 65 N. J. Eq. 407 is in some respects similar to the instant case. It involved a construction of a will dealing with real and personal property and a trust estate in connection with the personalty. On page 416, Chancellor Magie says:

"It is further urged that the court should declare its opinion as to the *effect of the will* upon the real estate of which Benjamin B. Cooper died seized, it being asserted that upon the language of the Will it is uncertain whether the real estate passed thereby, and if so, *who now is entitled thereto*. But the determination as to the ownership of real estate is within the particular province of law courts. *In the absence of some specific equitable relief which this court can give, it would be impertinent for it to express an opinion which would not be binding upon a law court in an action of ejectment and which could not be enforced by any decree of the court.*" *Torrey v. Torrey*, 10 Dick. Ch. Rep. 410.

See also *Gillen v. Hadley*, 72 Eq. p. 505; *Krickel v. Spits*, 74 Eq. 581; *Hoe v. Hoe*, 84 Eq. p. 401; *Fidelity Union Trust v. Roest*, 113 Eq. 368; *Thropp v. Public Service Elec. Co.*, 84 Eq. p. 144; *Smith v. Marrow*, 84 Eq. 395; *Torrey v. Torrey*, 55 N. J. Eq. 410.

It might not be amiss here to refer briefly to the declaratory judgment acts passed by the legislature in 1915 and 1924. Vice-Chancellor Backes dealt with both these acts in the case of *Paterson v. Currier*, 98 N. J. Eq. p. 48, and held that neither act conferred additional jurisdiction on the Court of Chancery and further that legal title to land was

cognizable at law only, and could not be determined by the Court of Chancery under either of the foregoing acts. See *Township of Ewing v. Trenton*, 137 N. J. Eq. 109.

Vice-Chancellor Berry in his conclusions in the instant case (injunction suit), evidently recognized the rule as above stated, *viz*: that there must be present some matter of an equitable nature—such as a trust, fraud, accident or mistake, etc.—to justify the examination and determination of the legal title to land by a Court of Equity, and he attempts to follow that rule by finding that a trust existed. He says:

“It cannot be denied that a trust was created by the testator by his *will*, that the executors of his will are trustees of the trust *res* until it is transferred to the Howard Whitfield Foundation, that the lands here involved are a part of that trust *res* and that after such transfer, that Foundation will be the trustee thereof” (C., p. 62, l. 22).

Here we find the Vice-Chancellor resorting to testator's *will* in his quest for an issue which will keep the controversy within the well defined boundaries of equity jurisdiction,

“The *will* creates a trust and the property in question is part of the trust *res*”,

says the Vice-Chancellor, and this regardless of what the *pleadings* in the case (will construction case) allege or claim. This is certainly a departure from the well established principle that no man shall be foreclosed in any matter which he has not submitted to a court of competent jurisdiction for its decision. The *pleadings* determine what

the substance of his claim is. It is the *pleadings* that present the issues which he asks the Court to decide, and this is of vital importance in the instant case, for when it is once determined what the issues in the earlier suit (will construction case) were, then it only remains to compare them with the issues in the later suit (ejectment action) and the *res judicata* question is solved.

Shall testator's will or complainant's bill in the will construction case, determine what the issues were in that suit? Upon that subject Chief Justice Beasley in *Mundy v. Vail*, *supra*, says as follows on p. 422.

"Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises."

In *Reynolds v. Stockton*, 43 N. J. Eq. p. 214, Justice Van Syckel, speaking for the Court of Errors and Appeals, says:

"The question presented by the appeal to this court is whether to the decree of the New York court the conclusive force and effect of a judgment must be accorded.

That question is distinctly presented in *Mundy v. Vail*, 5 Vr. 418, where it is held by the supreme court of this state that a decree which is entirely aside of the issue raised in the *record* is invalid and will be treated as a nullity, *even in a collateral proceeding*.

A decree or judgment which is not appropriate to any part of the matter in controversy before the court can have no force. The matter in controversy

is that *exclusively* which is presented by the *pleadings* and the issue framed thereby.

The object of the New York suit was fully accomplished, *so far as the pleadings disclosed its purpose*, when the New York fund was disposed of. There was an entire *absence of such specific allegations in the complaint* as were necessary to put the receiver of the New Jersey Company on his defense in respect to the state of the account between that company and the Hope company.

The decree in New York, having adjudicated a *matter not presented by the pleadings nor within the issue*, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday v. Vail*, it must be treated as a nullity."

In *Jones v. Davenport*, 45 N. J. Eq. p. 78, Vice-Chancellor Van Fleet on p. 81 says:

"There can be no doubt that that decree was an absolute nullity. The principle is authoritatively settled, that a decree or judgment, on a matter outside of the issue raised by the *pleadings*, is a nullity, and is nowhere entitled to the least respect as a judicial sentence. *Munday v. Vail*, 5 Vr. 418; *Reynolds v. Stockton*, 16 Stew. Eq. 211."

And continuing on p. 85, same case, says:

"Courts can only hear and determine causes *on the pleadings actually filed*, and not on what the parties or their solicitors may agree they shall be. One of the most important purposes intended to be accomplished in requiring written pleadings to be filed is, that the Court may be informed, clearly and distinctly, what is the subject-matter of the suit, so that it may know on what point it will be required to pronounce judgment."

Looking then at the *pleadings* in the will construction case, we find that Whitfield, in his bill, did not set up a trust as to the real estate. He expressly excludes the real estate from the trust, therefore the finding of Vice-Chancellor Berry that there was a trust, was matter outside the issue raised by the pleadings and is a nullity. What were the pleadings in the will construction case?

The first paragraph of the bill in that case states that Howard Whitfield died September 20, 1938, leaving a last will and testament and codicil which was admitted to probate in the Prerogative Court and that letters testamentary were issued to Theodore D. Parsons and Harry B. Heaviland (the complainants herein) who took upon themselves the burden of administering the decedent's estate.

The second paragraph describes the complaining parties and states that they are the only next of kin *and heirs at law* of decedent and that their mother, Eleanor Whitfield had divorced decedent.

The third paragraph states that Florence Whitfield, decedent's second wife, had predeceased him, having died without issue on August 13, 1936.

The gravamen of the suit is to be found in the paragraphs that follow.

The fourth paragraph charges that the executors proposed to convey and deliver (it does not say to whom) all real estate and personal property of which decedent died seized *except a certain part thereof out of which said executors propose to pay certain annuities*. We are not informed by this paragraph whether the part excepted from the transfer of decedent's estate to be used to pay those

annuities, include the property involved in the ejectment suit. Then follows this enlightening paragraph (paragraph 5).

“That upon said transfer to said corporation substantially all assets will be distributed in a manner contrary to the provisions of said will, for by the third paragraph thereof all the rest, residue and remainder of decedent’s estate, *excepting certain real estate situate at No. 75 Broad Street (property in ejectment suit)* and Nos. 16-18 Wallace St. in the Borough of Red Bank was given, devised and bequeathed, and thereupon became vested *in trust* nevertheless with the remainder over, ‘in equal shares to my child or children, their heirs and assigns forever’.”

Here the pleader alleges that the residuary estate *excepting 73 Broad Street (property in ejectment suit) and 16-18 Wallace Street* was given, devised and bequeathed in trust with the remainder over to my child or children their heirs and assigns forever. Thus the real estate is specifically excepted from any trust. The balance of the residuary estate is given in trust with remainder over.

The next paragraph (paragraph 6) alleges that complainants (the defendants herein) claim *said remainder* by reason of being children of decedent and for other reasons set forth in that paragraph.

The “*said remainder*” obviously refers to the preceding paragraph wherein it is alleged that the residuary estate *excepting the real estate involved in the ejectment suit* and another piece of property was given *in trust with remainder over*.

The remaining three paragraphs of the complaint discloses no trust or other equity in connection with the realty.

The prayer of the bill asks for a construction of the will and codicil and that the court declare complainants' rights or relations in respect thereto.

Thus it appears from the bill filed by complainant in the will construction case that the real estate is expressly excluded from the trust and that Vice-Chancellor Berry was in error when he held that a trust of the real estate in question was involved in that case and that, therefore, the Court of Chancery had jurisdiction. We maintain that no trust was claimed for the real estate in the will construction case and hence the Court of Chancery had no jurisdiction to determine the title to it. See *Hayday v. Hayday*, 39 Atl. Rep. 373. Furthermore it is to be observed from the bill filed by complainant in the will construction case that they sue and claim as heirs or devisees and not as a party directly interested in a trust.

Nor does the answer filed by Messrs. Parsons and Heaviland, to the bill in the will construction case speak of a trust, excepting to say that paragraph 7 of the will is not void as violative of the rule against perpetuities (See 106 case), which is the identical issue dealt with in the case of *Goetz v. Sickel*, 71 N. J. Eq. 317 wherein the Court refused to decide that question since it had to do with legal title to real estate. We speak at length of that issue later on in this brief. Nor does the answer attempt to defend their title as trustees, it does not even say they have title as trustees, it only undertakes to construe the will in such a manner that the complainants-appellants do not take either

as heirs or devisees (see pars. 5-6-7 of answer in will construction case pp. 104-105-106 of case). Nor do they appear in the case as *trustees*. Their answer is filed as "*Executors* of the last will and testament and codicil of Howard Whitfield, dec'd" (See p. 103 case) and the answer is signed as solicitors for the *executors*, not the *trustees*. (See p. 107 case).

Moreover in the bill filed in the present case (injunction bill) now before this Court on appeal, it is alleged by complainants-appellees that the Whitfields claimed in the earlier case (will construction case) either as devisees or heirs by reason of intestancy; not as persons interested in a trust. Furthermore that bill is also filed by Messrs. Parsons and Heaviland, as *executors*, not as *trustees*.

In *Torrey v. Torrey*, 55 N. J. Eq. 410, appears the following:

"Here is a statement of a dispute confined wholly to conflicting claims between different parties, each asserting a purely legal estate in lands, one as devisee in fee, the other as heir-in-law. The power of courts of equity to construe devises of real estate is limited to such dispositions as create or involve the creation of trusts. So far as a will of real property devises purely legal estates, and the devisees therein obtain purely legal titles to land, their enforcement belongs to the courts of Law. Pom. Eq. Jur. § 1155.

The jurisdiction exercised by courts of equity in construing devises of lands is incidental to its general jurisdiction over trusts and the performance or enforcement of trusts, either express or implied; and a suit in equity of this character can only be maintained by some party directly interested in the trust under the will and not by a devisee of a mere legal title. Pom. Eq. Jur. § 1156.

and continuing on p. 413 beginning at bt. of page and on p. 414:

“In New York the doctrine was explicitly declared by Chancellor Walworth, in the leading case of *Bowers v. Smith*, 10 Paige 199, that neither the heirs-at-law nor the devisees who claim mere legal estates in the testator’s real property, can file a bill for the sole purpose of obtaining a judicial construction of his will.

In *Onderdonk v. Mott*, 34 Barb. 112, the supreme court of New York, sitting in equity determined that the difficulty of want of jurisdiction in equity to construe a will at the instance of a devisee claiming a mere legal estate in real property, was insuperable, if it existed, even if not raised by the opposing party.

The court of appeals of New York in *Bailey v. Briggs*, 56 N. Y. 413, approved of the doctrine as stated in *Bowers v. Smith*, *ubi supra*, holding the jurisdiction to be incidental to that over trusts. This view has been consistently supported by the court of last resort in New York, in *Chipman v. Montgomery*, 63 N. Y. 230, and *Post v. Hover*, 33 N. Y. 602.

In *Dill v. Wisner*, 88 N. Y. 160, the court of appeals declared that the right of an executor to sue “for construction of a will of real estate depends entirely upon the question whether he is invested with a trust under the will in reference to the subject-matter of the devise, and it is only in such cases that a court of equity, on the assumption of its right of supervision over trusts and trustees, will assume jurisdiction.”

From the pleadings in both cases (will construction and injunction case) it is clear that the entire litigation re-

volved around one issue viz: legal title to the land without any particular equity in connection therewith.

It thus appears that in the will construction case there was nothing in the character of the litigation that would transfer it to the equity court.

But even though as erroneously held by the Vice-Chancellor in the instant case, there were present in the will construction case, the issue as to whether a trust existed or not in connection with the land and whether the complainants-appellants were the trustees, a difficulty would still persist.

One of the essential concomitants of a trust is legal title in the trustee and the court of equity cannot determine legal title to land merely because one of the claimants to the land is an *alleged trustee*. This is so even though the trustee comes into court for instructions.

In *Goetz v. Sickel*, 71 Eq. 317, cited with approval in *Gillen v. Hadley*, 72 Eq. 513, Chancellor Magie had before him a bill filed by two executors of the will of Abraham Sickel. Under the third paragraph of the will certain real property in Newark was devised to the executors in trust. The question mooted was whether that devise was not wholly void because in contravention of the rule against perpetuities. The prayer of the bill was for a decree that the trusts in said will may be performed and carried into execution and that all necessary directions may be given for that purpose. There is a prayer for further relief under which any relief germane to the case made might be decreed. On page 318, Chancellor Magie says:

"It is obvious that the case made will not support a decree establishing the title of the house and lot which was the subject of the alleged devise contained in the third clause of the will. A decree that the complainants (executors) acquired title thereto by that clause of the will would *not bar an ejectment at law*, etc."

The word "executors", my insert. And continuing on page 319, Chancellor Magie says:

"It results, in my judgment, that complainants have presented no ground for relief, unless it may be under the contention strenuously urged by their counsel to the effect that they, as trustees, are entitled to the direction of the court in the performance of their trust duties.

This claim is so forcible that I hoped I could adopt that view and give some relief. Subsequent reflection has led me to conclude that no decree can be made giving the relief claimed.

The right of trustees to seek the direction of this court, and the duty of this court to give such directions in certain cases, is undoubted. *Hoagland v. Cooper*, 65 N. J. Eq. (20 Dick.) 407. But it is plain that what complainants seek by this bill is not direction as to the performance of their duty as trustees, but to discover whether they are trustees, and therefore charged with any duty as such. *Whether or not complainants are trustees depends upon whether the devise in the third clause of the will is valid or void. If valid, complainants are trustees. If void, they are not.* This leads back to the observations heretofore made, that the question is one of title to land, and which a decree here in this cause cannot settle.

Nor can I conceive of any decree made upon this ground which would protect complainants, and this for the reasons before given.

In my judgment, complainants present no greater claim for relief than would be presented if they had brought into court persons having no interest under the will, but who, they charged, claimed title to the house and lot which was devised by the third clause. I deem it beyond question that they could not, under pretence of desire for instruction as to their duties under that devise, draw into this court a question of title to real estate."

The bill was dismissed.

Another question that may arise is:

Can the parties by consent, waiver of objection, or in any other manner confer jurisdiction over the subject matter of a suit which the court did not have by law?

In New Jersey, as well as in most of the sister states, that question has been uniformly answered in the negative. It has frequently been before our courts. See *Dodd v. Una*, 40 Eq. 672, where Justice Magie speaking for the Court of Errors and Appeals, says on page 713:

"I am unable to discover any ground to refuse to hear this objection, which will not violate the well-settled rule that consent will not confer jurisdiction. Where the subject-matter is within the court's jurisdiction the appearance and submission of parties may justify the assertion of the jurisdiction, and prevent their afterward questioning it. *Tompkins v. Schomp*, 16 Vr. 488; *Funck v. Smith*, 17 Vr. 484. But where the subject-matter is not within the jurisdiction, neither consent nor acquiescence can confer

the requisite jurisdiction. What cannot be done directly cannot be done indirectly. This principle has always been maintained in our courts with rigor."

See also *School Trustees v. Stocker*, 42 N. J. L. 116.

In the recent case of *Hersch v. Rosensohn*, 125 N. J. Eq. p. 1, Vice-Chancellor Stein on page 17, states the rule in the following language:

"The counterclaim presents a purely legal question for which there is an adequate remedy at law. The mere fact that a court of equity has acquired jurisdiction for one purpose, does not empower the court to retain the case for complete relief. *Mercer County Traction Co. v. United New Jersey Railroad and Canal Co.*, 65 N. J. Eq. 574; 56 Atl. Rep. 897. The principle that equity will not entertain jurisdiction where there is an adequate remedy at law is so well established that it needs no citation of cases to support it. And the fact that objection has not been made on any pleading or motion directed to the counterclaim, cannot confer jurisdiction since such jurisdiction cannot be acquired by consent or acquiescence of the parties. *Long Branch v. Hoch*, 99 N. J. Eq. 103; 138 Atl. Rep. 106. See also *Ex parte Hall*, 118 Atl. Rep. 349."

In Chancery, when that court has general jurisdiction over the subject matter as in cases of trusts, fraud, accident or mistake, even though it should not entertain jurisdiction of the particular suit because of an adequate remedy at law still, it may retain jurisdiction of the cause if no objection is made in *limine*. The objection then is said to be waived. See *Pridmore v. Steneck*, 112 N. J. Eq. p. 38 bt. of page.

This rule, however, does not apply when the subject matter of the suit is fundamentally beyond the field of equitable cognizance. This distinction is pointed out in *Stein v. Elizabeth Trust Co.*, 125 Eq. 399; followed in the Court of Errors in a case between the same parties. See *Stein v. Elizabeth Trust Co.*, 131 Eq. on p. 36. In the former case, Judge Rafferty, speaking for the Court of Errors and Appeals, on p. 401 and 402, said:

“Defendant argues that the decree appealed from was erroneously entered because, amongst other reasons, the court of chancery was without jurisdiction to entertain the cause. The point is well taken. The question of jurisdiction was not raised before the learned vice-chancellor and did not receive his consideration. Notwithstanding, it may be considered by this court on appeal. *Dickinson v. Plainfield*, 116 N. J. L. 336, 337, and cases there cited”.

In *Pridmore v. Steneck*, 122 N. J. Eq. 35, 39, Mr. Justice Heher, speaking for this court, said:

“It is the settled rule that jurisdiction over the subject matter of a cause cannot be granted or conferred by consent; and, in the application of this doctrine of waiver to cases of fraud, a distinction is of necessity to be made between a *subject-matter fundamentally beyond the field of equitable cognizance*, e. g., the cancellation of a will obtained by fraudulent means, and *the mere propriety of the exercise of general equity jurisdiction*.”

It is our contention that in the will construction case the title to the real estate involved was subject matter fundamentally beyond the field of equitable cognizance.

We further urge that as to one of the complainants in the will construction suit (Harold Whitfield, an incompetent) there could be no waiver of jurisdictional objection since such waiver in effect would be a denial of the constitutional right of trial by jury which the action in ejectment affords all litigants claiming title and possession to real estate. We concede that constitutional rights may be waived but not as to insane persons.

Upon that subject we would refer to 32 *Corpus Juris*, p. 777, par. 606-607, wherein the following statement of the law appears:

"No one may waive or admit away any substantial rights of, or consent to, anything which may be prejudicial to an insane litigant, whether the person seeking to do so is the general committee or a guardian *ad litem*.

A general committee or guardian cannot waive or admit away any substantial rights of, or consent to, anything which may be substantially prejudicial to his ward. However, he may do or consent to any act in the course of the proceedings which does not substantially injure his ward nor change the nature or condition of his ward's estate."

See also *Caruso v. Caruso*, 102 N. J. Eq. 393.

If notwithstanding the views above expressed this Court decides that in the will construction case there was present subject matter of an equitable nature—*viz* a trust—and that the court of equity therefore had jurisdiction to decide as an incidental issue the question of legal title to real estate, we are then confronted with the rule that matters incidentally decided are not *res judicata* in a sub-

sequent action; therefore, the defendants-appellants were wrongly enjoined from pursuing their common law action of ejectment to have *directly* determined the title to the real estate in question.

In the "*Duchess of Kingston's Case*" a well known English authority to be found in Smith's Leading Cases, 9th Ed. Vol. 3 p. 1998, the rule was definitely stated as follows:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first that the judgment of a court of concurrent jurisdiction, *directly* upon the point, is as a plea, a bar, or as evidence conclusive between the same parties, upon the same matter, directly in question in another court: secondly, that the judgment of a court of exclusive jurisdiction, *directly* upon the point, is, in like manner, conclusive upon the same matter, between the same parties coming incidentally in question in another court, for a different purpose. *But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*"

That decision is the law of this state and was followed by Vice-Chancellor Stevens in *Mullaney v. Mullaney*, 65 N. J. Eq. 384, affirmed by the Court of Errors and Appeals upon the opinion of the Vice-Chancellor. See also *Dunham v. Marsh*, 52 N. J. Eq. p. 256, and *Platt v. Johnson*, 87 N. J. Eq. 403, wherein Chancellor Walker says:

“The Court of Chancery has power to decide a question beyond its jurisdiction when it arises incidentally and collaterally in a suit within its jurisdiction, which decision however has no force *res judicata* or by way of estoppel.”

See also *Janouneau Co. v. Wetherill*, 118 Atl. Rep. p. 707 opinion by Justice Minturn.

In *Hibshman v. Dulleban*, a Pennsylvania case, Watts Reports Vol. 4, p. 183, the issue of law is clearly and concisely stated in the following language:

“Did the question of fraud (legal title to real estate) come before the Orphans’ Court (equity court) directly or incidentally? Not directly certainly; for the court had jurisdiction of it but incidentally, and not to entertain an action whose immediate object should be to ascertain the fact.” (legal title to real estate) and (equity court) my insert.

In *Norton v. Larney*, 266 U. S. 511 Justice Sutherland states the rule as follows:

“The principle of *res judicata* does not apply to points which come under consideration only collaterally or incidentally”. Citing *Duchess of Kingston’s* case, 2 Smith Lead. Cases; *Hopkins v. Lee*, 6 Wheat, 109, 114; *Campbell v. Consalus*, 25 N. Y. 613, 617; *People ex rel. Reilly v. Johnson*, 38 N. Y. 63, 64, 66.

See also *North Carolina R. Co. v. Story*, 268 U. S. 288 on p. 292-294.

The sum and substance of the whole matter is that however the question of title to real estate came before the

equity court in the will construction case, its decision in that court afforded no ground for an injunction restraining the defendants-appellants from pursuing their action in ejectment, since if it came *directly* before the equity court, that court had no power or jurisdiction to decide it, and if *collaterally* then it is not *res judicata*.

Due Process of Law.

It is our further contention that the Court of Chancery of New Jersey is without power or jurisdiction to restrain the defendant herein from pursuing their common law action of ejectment with its right of trial by jury and any decree or order so adjudging would be in violation of Article 14, Section 1, of the Federal Constitution which provides,

“nor shall any state deprive any person of life, liberty or property *without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws.”

This amendment to our Federal Constitution, has received judicial consideration by our U. S. Supreme Court in many cases since its adoption; particularly in reference to the meaning of “due process of law”. In *Kennard v. Louisiana*, 92 U. S. R. 478, Chief Justice Waites states the rule as follows:

“The sole question presented for our consideration in this case, as stated by the Counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the Statute of Jan. 13, 1873, through her judiciary, has deprived Kennard of his office

without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done "In the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." We accept this as a sufficient definition of the terms "due process of law," for the purpose of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State Courts. *Our authority does not extend beyond an examination of the power of the courts below to proceed at all.*"

And in the well known case of *Pennoyer v. Neff*, 95 U. S. Rep. p. 565, Mr. Justice Field on p. 572, undertakes to define "due process of law" in the following language:

"Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our sys-

tems of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.*”

and in the comparatively recent case of *United Gas Pub. Serv. Co. v. State of Texas*, 303 U. S. R. 123, Justice Black in his concurring opinion, on p. 153 clearly defines “due process of law” in the following language:

“But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issue affecting it, he has, by the laws of the State, a fair trial in a court of justice, *according to the modes of proceeding applicable to such a case.*”

The U. S. Supreme Court reports are replete with cases upon the subject and they are all in accord with the views above expressed.

We have endeavored to show throughout the earlier part of this brief that the decree entered in the first case wherein this Court undertook to determine title to the real estate in question was a nullity because of lack of jurisdiction over the subject matter and that it could be attacked collaterally.

As was said by Vice-Chancellor Buchanan in *Ex Parte Hall*, 118 Atl. Rep. on p. 349:

“The jurisdiction of a court—its ‘right to speak’—is its right, or rather its power, to pronounce a particular judgment or decree as to a particular person in a particular action. If it has not such power, then its judgment is void and amounts to nothing.

Jurisdiction over the subject-matter of the suit cannot be acquired by consent. The power of a court to deal with any given cause of action rests solely upon its having been clothed with that power by the Constitution (where statutory authorization is not unconstitutional) by statute. The parties to the action cannot invest it with such power. If this court for instance, should assume to try a suit as to the subject-matter of which it had not jurisdiction, its decree would be void, even though the parties expressly stipulated that it should be binding, and even if the procedure and result of the trial and the decree were in other respects entirely correct and identical with that of the proper court of law.”

If, therefore, the decree of the Court in the earlier case wherein the will was construed and the title to the property in question determined, was void, or if the title to the property in question was only incidentally determined, then it is not *res judicata*, precluding the trial of title in the ejectment suit now pending. To hold that it was would be in utter defiance of “due process of law” as defined by our U. S. Supreme Court. It would not be “in accordance with the laws of this state a fair trial in a court of justice according to the modes of proceeding applicable to such a case”. See *United Gas Pub. Serv. Co. v. Texas*, p. 153, *supra*. See also *Angel v. Bullington*, Law, ed. Advance Opinions 1946-1947, Vol 91—No. 8, p. 560 wherein Justice Frankfurter says:

“The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution.” *McKnett v. St. Louis & S. F. R. Co.*, 292 U. S. 230, 233, 78 L. Ed. 1227, 1229, 54 S. Ct. 690. The Contract Clause, the Full Faith and Credit Clause, all Privileges or Immunities Clause, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction, “the adjective law of the State,” or the exercise of its right to regulate “the practice and procedure” of its courts. *Broderick v. Rosner*, 294 U. S. 629, 79 L. Ed. 1100, 1107, 55 S. Ct. 589, 100 A. L. R. 1133. A State “cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.” *Kenney v. Supreme Lodge, L. O.*, 252 U. S. 411, 415, 64 L. Ed. 638, 640, 40 S. Ct. 371, 10 A. L. R. 716; and see *White v. Hart*, 13 Wall. (U. S.) 646, 20 L. Ed. 685.”

For the foregoing reasons we respectfully submit that the writ of certiorari should issue.

Respectfully submitted,

KALISCH & KALISCH,
Solicitors for and of Counsel with
Defendants-Appellants.

HARRY KALISCH,
Of Counsel.